Filed 1/4/10 P. v. Villasana CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN VILLASANA, JR.,

Defendant and Appellant.

F056773

(Super. Ct. No. F08902681)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison and Houry Sanderson, Judges.*

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

* Judge Ellison denied defendant's suppression motion; Judge Sanderson sentenced defendant.

This is an appeal from judgment entered after a plea of no contest. Defendant and appellant Juan Villasana, Jr., contends his suppression motion should have been granted. Finding his contentions contrary to settled law, we will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant collaborated with an employee of a Fosters Freeze in Fresno to rob the restaurant at gunpoint about 8 p.m. on April 22, 2008. Acting on information from other employees, officers questioned the employee, Brown. Brown told the officers the robbery had been committed by "Nate" and "JJ Valenzuela." Brown said the robbers had used Nate's car and JJ's handgun. He directed the officers to a location where the robbers might be found, but Nate's car was not in its usual parking spot. Brown then directed the officers to the residence that becomes the subject of the search in issue in this case. There, Brown identified a car in the driveway as being Nate's. While the investigating officers were waiting for additional officers to arrive, defendant, whom Brown identified as "JJ," walked up to the residence and went inside.

When backup units arrived, close to midnight that same date, the police surrounded the house and, using a loudspeaker, directed everyone in the house to come outside. Gloria Pineda (who identified herself as the owner of the house), two children, two men (including defendant), and another woman came out of the house. An officer conducted a sweep of the house to make sure there was no one else inside. Other officers spoke with Pineda and defendant.

Pineda informed officers the other woman was her daughter, Felicia Hamilton. Hamilton lived in a converted room in the garage and defendant sometimes stayed with Hamilton. Pineda identified the other persons as her own boyfriend and her two younger children. The officers explained why they were there and that they suspected defendant's gun might be inside the residence. They asked permission to search the premises. Pineda consented. In the room in the garage, officers found a packet of cash next to a handgun.

In the meantime, other officers arrested defendant and administered *Miranda* warnings to him. (See *Miranda* v. *Arizona* (1966) 384 U.S. 436.) Defendant admitted committing the robbery.

As Hamilton emerged from the house, she was detained by an officer. Before placing her in the rear of a patrol car, the officer patsearched Hamilton and located a cell phone in her waistband. The officer asked if he could inspect it. When he tried to access the telephone, the officer discovered it was protected by a password. He asked Hamilton to provide the password and she did. The officer found text messages stored on the cell phone, apparently describing the robbery as it occurred.

Defendant was charged with two counts of robbery (Pen. Code, § 211), each with an enhancement allegation that defendant personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b). Defendant was also charged with one count of conspiracy to commit robbery. (Pen. Code, § 182, subd. (a)(1).)

Defendant filed a suppression motion contending his warrantless arrest was illegal because it was functionally equivalent to an arrest inside defendant's residence; that statements and evidence were fruits of the illegal arrest; that Pineda's consent to the search of the house was invalid; and that the seizure and search of Hamilton's cell phone were unlawful. After an evidentiary hearing, the court denied the suppression motion. It concluded the arrest was not unlawful and that Pineda and Hamilton validly consented to search of the house and the cell phone, respectively.

After denial of the suppression motion, defendant entered into a plea agreement. He pleaded no contest to two counts of second degree robbery. He admitted personal use of a firearm as to one count and that he was armed with a firearm as to the other count (Pen. Code, § 12022.5, subd. (a)). In return, defendant was to be given a prison sentence of 12 years and the conspiracy count would be dismissed.

Sentence was imposed accordingly, and defendant filed a timely notice of appeal.

DISCUSSION

A. The Arrest

Payton v. New York (1980) 445 U.S. 573, 583-590, holds that, in the absence of consent or exigent circumstances, police may not enter a suspect's home to arrest him or her without a warrant. In this case, the trial court concluded that the arrest did not, constructively or otherwise, occur within the home. The parties agree the arrest, wherever it occurred and though it was warrantless, was supported by probable cause.

Defendant acknowledges that he was outside the home when he was physically arrested and that the police did not enter the home at any time before the arrest. He also acknowledges that *People v. Trudell* (1985) 173 Cal.App.3d 1221, 1230, held that where police surround a home and instruct the occupants to come out, the *Payton* principle is not applicable. We agree with *Trudell* and that it applies here. Clearly, the police are entitled to surround a house while they obtain a search warrant. When they order the occupants to come out of the house, the occupants are presented with a meaningful choice to obey or to remain in the house. Here, as in *Trudell*, the police did not announce, for example, that anyone remaining in the house would be shot or that the evacuation would be accomplished by the use of tear gas.

Defendant suggests we should reject the reasoning of *Trudell*. He contends the later United States Supreme Court decision in *California v. Hodari D.* (1991) 499 U.S. 621, 626 (*Hodari D.*), requires that we conclude the arrest in the present case occurred at the time the police asserted dominion over the premises and the occupants. The issue in *Hodari D.* was whether the suspect was in custody -- i.e., had been seized -- at the time he discarded contraband. The court held that there were two ways detention could be effected by police officers. First, detention could be effected by physical force. Second, detention could be effected by the suspect's submission to an assertion of authority to detain--in that case, a police command that the fleeing suspect stop. (*Id*. at pp. 625-626.) Defendant contends

that, under *Hodari D.*, he was seized when the police asserted the authority to order him from the house.

Defendant misses the true point of *Hodari D., supra,* 499 U.S. 621. The *Hodari D.* court concluded the suspect was *not* in custody, despite the assertion of police authority, because he did not comply with the order to stop. In other words, submission to the assertion of authority effectuates the seizure of the person for Fourth Amendment purposes. In this case, that submission to authority took place when defendant was outside the home, and not before. Under *Hodari D.*, as a result, the seizure of the person in our case did not occur inside the residence and *Hodari D.* provides no support for reconsidering the holding in *People v. Trudell, supra,* 173 Cal.App.3d 1221.

Defendant also suggests that the holding in *People v. Trudell, supra*, 173 Cal.App.3d at page 1230 constitutes bad policy and should be rejected. He says a suspect has no way of knowing whether the police are asserting lawful authority but that social policy should require that suspects submit first and then question the assertion of authority, if appropriate. As such, he says, the law should afford the suspect rights commensurate with the decision to submit to authority in order to encourage compliance.

We find defendant's assertion unobjectionable. However, the question before us is whether police entered defendant's home to arrest him. They did not -- and the arrest in fact occurred outside the home when defendant submitted to police authority and came outside as instructed. Police validly arrested him.

Although we need not reach the issue, it seems clear that exigent circumstances justified the police action here, permitting a warrantless arrest inside the house, even though the police chose the more prudent course of ordering the occupants from the house. (See *Payton v. New York, supra,* 445 U.S. at pp. 583-590.) The trial court reached a similar conclusion, but stated, "I don't know that the case necessarily has to rely on that, though."

A continuous investigative trail, beginning at the scene of the armed robbery, led the police to defendant a few hours later. They had reason to believe defendant was the armed perpetrator and that the gun was his; they had no reason to believe he was not still in possession of the gun. (See *People v. Williams* (1989) 48 Cal.3d 1112, 1138.)

B. The Consensual Searches and Seizure

Defendant contends Pineda's consent to the search of the house and Hamilton's consent to the seizure and search of her cell phone "were the fruit of an illegal seizure and therefore invalid as a matter of law." To the extent defendant contends the "illegal seizure" was his own arrest, we have held that the arrest was not illegal. To the extent he contends the "illegal seizure" was the alleged detention of Pineda and Hamilton, defendant is not entitled to suppression of evidence based on violation of the rights of other persons. (*In re Lance W.* (1985) 37 Cal.3d 873, 882, 888.) Defendant acknowledges as much in his reply brief: "[I]f this court follows Trudell, then the consents were valid and appellant has no further argument." We have concluded *People v. Trudell, supra,* 173 Cal.App.3d 1221, reaches the correct result, and we agree with defendant that this conclusion resolves the remaining issues defendant presents.

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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GOMES, J.